Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-911

# In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

ROBBINS TIRE AND RUBBER COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–26A) is reported at 563 F. 2d 724. The memorandum opinion of the district court (Pet. App. C. pp. 28A–34A) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 27A) was entered on November 21, 1977. The petition for a writ of certiorari was filed on December 23, 1977, and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the pre-hearing disclosure of statements of prospective witnesses obtained by the National Labor Relations Board [1] in an investigation that has culminated in a pending unfair labor practice proceeding would "interfere with enforcement proceedings," so that the statements are exempt from disclosure under Exemption 7(A) of the Freedom of Information Act ("FOIA").

2. Whether such statements are exempt from disclosure under Exemption 5 of the FOIA as the work product of an attorney prepared in contemplation of litigation.

## STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. (1976 ed.) 552, are as follows:

> Public information; agency rules, opinions, orders, records, and proceedings.
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of

[1] The petition was filed on behalf of the Board and its General Counsel. Under Section 3(d) of the National Labor Relations Act, as amended, 61 Stat. 139, 73 Stat. 542, 29 U.S.C. 153(d), the General Counsel of the Board has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." References to the "the Board" include the General Counsel acting in his independent capacity.



> this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (4) * * *
>
> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes but only to the

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extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

## STATEMENT

### A. THE BOARD PROCEEDINGS

Upon a petition filed by the Aluminum Workers International Union, AFL–CIO ("the Union"), the Regional Director of the National Labor Relations Board conducted a representation election among a unit of employees of Robbins Tire and Rubber Company ("the Company") on October 9, 1975; 244 votes were cast for the Union, 248 against it, and 10 ballots were challenged (A. 11). The Union filed timely objections alleging that the employer had impermissibly interfered with the election. The Regional Director investigated the challenges to the ballots and the objections to the election, and recommended to the Board that 7 of the challenged ballots be counted, and, if they did not result in the Union's receiving a majority of the votes cast, that a hearing be held on certain of the Union's objections (A. 11–23). The Board adopted the Regional Director's recommendations (A. 24–25).



Meanwhile, on March 26, 1976, the Regional Director issued an unfair labor practice complaint against the Company alleging that it had committed numerous violations of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), as amended, 61 Stat. 140, 29 U.S.C. 158(a)(1), during the preelection period, including (1) interrogating employees about their union activities; (2) promising benefits if the employees rejected the Union; (3) threatening that if the Union were selected it would discharge prounion employees, close the plant, withdraw benefits, and refuse to bargain (A. 28–35). A hearing on the complaint was scheduled for April 27, 1976 (A. 34–35).

When a count of the challenged ballots failed to resolve the election in the Union's favor, it was necessary to hold a hearing on the Union's contentions that the election should be set aside because of the employer's conduct. Since the conduct covered by the Union's objections was largely identical to that covered by the unfair labor practice complaint, the Regional Director consolidated the two proceedings

and set the objections down for hearing at the same time as the hearing on the complaint (A. 5).

On March 31, 1976, the Company, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, wrote the Regional Director requesting that he make available for inspection and copying, at least seven days prior to the start of the hearings, copies of all written statements, signed or unsigned, contained in the Board's case files with respect to witnesses whom the Board intended to call (A. 37–38). The Regional Director denied this request on the ground that the information was privileged against disclosure under Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5), (7)(A), (C) and (D) (A. 39–42). The Company appealed the Regional Director's denial to the General Counsel of the Board (A. 43–45). The General Counsel sustained the Regional Director (Pet. App. E, pp. 37A–39A).

### B. THE FOIA SUIT

On April 15, 1976, before it had received the General Counsel's decision on its appeal, the Company filed this action in the United States District Court for the Northern District of Alabama, pursuant to the FOIA, 5 U.S.C. 552(a)(4)(B), alleging that the statements sought were records that the Board was required to disclose under 5 U.S.C. 552(a)(3). The Company sought, *inter alia,* a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, an order requiring the Board to produce the requested statements for inspection and copying at least seven days prior to the start of the hearing, and a permanent injunction enjoining the Board from holding its hearing until this condition had been met (A. 3–8).



After a consolidated hearing on the merits of the complaint and the application for a preliminary injunction, the district court rejected the Board's claim that the statements sought were protected against disclosure under Exemptions 5 and 7, and it ordered the Board to provide the statements for inspection and copying on or before April 22, 1976, or, at the Board's election, at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (Pet. App. C, pp. 28A–34A; Pet. App. D, pp. 35A–36A).

The court of appeals affirmed (Pet. App. A). It concluded that Exemption 7 of the FOIA, which protects against disclosure of investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, is inapplicable unless an agency shows that disclosure would interefere with a particular enforcement proceeding (*id.* at 11A–12A). Since the Board had not introduced any evidence tending to show that intimidation of those witnesses giving statements to the Board was likely to occur in this case during the five days between discovery and the Board hearing, the court held that the Board had not "sustained its burden of * * * bring[ing] exemption 7(A) into play" (*id.* at 17A).

The court of appeals also concluded that Exemption 5, which protects against disclosure of " 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency,' " was inapplicable to "purely factual material such as verbatim witness statements" (*id.* at 20A, 22A). The court acknowledged (*id.* at 21A) that Exemption 5 incorporates the work-product privilege of *Hickman* v. *Taylor*, 329 U.S. 495, which generally protects even relevant and non-privileged witness statements unless production is essential to the preparation of one's case. The court reasoned, however, that the *Hickman* privilege as read into Exemption 5 "must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes" (*ibid.*).

## SUMMARY OF ARGUMENT

### I

The Fifth Circuit's conclusion in this case—that absent proof of the likelihood of intimidation of particular witnesses, statements obtained by the Board during an investigation that culminates in a pending unfair labor practice proceeding are not protected from pre-hearing disclosure by Exemption 7(A)—sanctions the general use of the FOIA as a discovery device in such proceedings. This construction of the FOIA will mark a radical departure from the Board's present procedures, and will seriously impair the Board's ability to carry out its statutory functions.



Congress did not intend such a result; the FOIA did not purport to sanction such discovery or to override the strict limitations that the Board and the courts have traditionally placed on discovery because of the potential for intimidation and harassment inherent in the relationship between employer and employee.

A. Neither the National Labor Relations Act, nor the procedures established thereunder, provide for pre-hearing disclosure of witness statements. The Board, by rule, has provided that a pre-trial statement will be available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1). The Board's rule is "reasonably designed to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *National Labor Relations Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2).

B. Exemption 7 of the FOIA, as originally enacted in 1966, 80 Stat. 251, protected against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." The legislative history indicates that the exemption was intended (1) to prevent premature disclosure of the government's investigation, so that it could present its strongest case at trial and (2) to protect government sources, so that persons would volunteer information without fear of reprisal. One of the specific purposes of Exemption 7 was to pro-

tect Board witness statements from pre-hearing disclosure. Finding that the pre-hearing disclosure of Board witness statements would impair the objectives embodied in Exemption 7, the courts uniformly concluded that the exemption protected those statements against such disclosure. See *Wellman Industries, Inc.* v. *National Labor Relations Board,* 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834.

C. In 1974, Exemption 7 was amended, in pertinent part, to cover: "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *." The amendment was aimed at a series of decisions by the courts of appeals which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether an enforcement proceeding were still contemplated in that case, or even whether the information was otherwise available to the public. There is no indication that Congress intended this amendment to overrule the cases holding that witness statements obtained by the Board in an investigation of a particular case were exempt from disclosure under the original Exemption 7, or to enlarge dramatically the scope of discovery under the National Labor Relations Act. Indeed, Senator Hart, a sponsor of the amendment, stated that the amendment would continue to bar disclosure whenever the government's case in court would be harmed by the premature release of evidence or information not in the possession of known or potential defendants.



Accordingly, the courts of appeals considering the question—with the exception of the Fifth Circuit here—have adopted the reasoning of the Second Circuit in *Title Guarantee Co.* v. *National Labor Relations Board,* 534 F. 2d 484, certiorari denied, 429 U.S. 834. The Second Circuit held that pre-hearing disclosure of statements obtained by the Board from employees and their representatives would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *." 534 F. 2d at 491.

"The labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings." *Climax Molybdenum Co.* v. *National Labor Relations Board,* 539 F. 2d 63, 65 (C.A. 10). Even where the request is for the statements of only those witnesses scheduled to testify there is a "possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *.'" *Goodfriend*

*Western Corp.* v. *Fuchs,* 535 F. 2d. 145, 147 (C.A. 1), certiorari denied, 429 U.S. 895.

The court of appeals' rule that Exemption 7(A) applies only where the Board can show that particular witnesses are likely to be intimidated is unrealistic and unworkable. As the courts have recognized, intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 562, n. 8 (C.A. 6). In any event, determining on a case-by-case basis whether disclosure of a particular statement would interfere with Board enforcement proceedings is a task for which the courts are not equipped, and it would be likely to result in crippling delays in Board proceedings.

## II

Board witness statements also are protected from disclosure by FOIA Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This Court has held that Exemption 5 protects documents which are "normally privileged in the civil discovery context," and that it incorporates not only the government's executive privilege, but also the "attorney work product privileg[e]." *National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 149. As the court of appeals recognized, the witness statements requested here fall within the work product privilege, as defined in *Hickman* v. *Taylor,* 329 U.S. 495, because



they are documents prepared in anticipation of litigation by attorneys or those working with attorneys.

The Fifth Circuit's conclusion that Exemption 5 protects only agency deliberative processes ignores the critical difference between the executive privilege and the work product privilege. Because the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policy making processes stand on a different footing from purely factual material, which would not ordinarily reveal the deliberative process. This reasoning is inapplicable to the attorney work product privilege, which by definition is a privilege encompassing all the materials that an attorney has prepared in anticipation of litigation. Since disclosure of factual material in an attorney's files would violate the protected status of those files no less than would the disclosure of deliberative material therein, the work product privilege incorporated in Exemption 5, unlike executive privilege, protects both types of material.

## ARGUMENT

### I. WITNESS STATEMENTS OBTAINED BY THE NATIONAL LABOR RELATIONS BOARD IN CONNECTION WITH A PENDING UNFAIR LABOR PRACTICE PROCEEDING ARE EXEMPT FROM PRE-HEARING DISCLOSURE UNDER EXEMPTION 7(A) OF THE FOIA

Because witnesses in labor litigation are especially susceptible to retaliation, coercion, or influence by

either the employer or union, the Board's rules do not provide for general pre-hearing discovery; the statements of a witness called to testify by the General Counsel or the charging party are made available to the opposing party for cross-examination only after the witness has testified. When the FOIA was enacted in 1966 (80 Stat. 250), one reason for the inclusion of Exemption 7 was to ensure that the Act would not require the pre-hearing disclosure of witness statements in Board enforcement proceedings.

There is no indication that Congress intended the 1974 amendment to Exemption 7 to overrule the cases holding that witness statements obtained by the Board in an on-going case were exempt from disclosure under the original Exemption 7. Nor is there any indication that Congress intended the FOIA—which was designed to inform the public about agency actions, not to benefit private litigants—to enlarge dramatically the scope of discovery under the National Labor Relations Act. Since pre-hearing disclosure of witness statements obtained by the Board in unfair labor practice investigations would interfere with the Board's enforcement proceedings, Exemption 7(A) protects such statements from disclosure.

A. NEITHER THE NATIONAL LABOR RELATIONS ACT, NOR THE PROCEDURES ESTABLISHED THEREUNDER, PROVIDE FOR PRE-HEARING DISCLOSURE OF WITNESS STATEMENTS

Section 6 of the National Labor Relations Act (NLRA), 29 U.S.C. 156, which empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of this Act," leaves



the question whether to adopt pre-hearing discovery procedures to the Board's discretion. See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 858 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631, 635 (C.A. 9); *D'Youville Manor, Lowell, Massachusetts, Inc.* v. *National Labor Relations Board*, 526 F. 2d 3, 7 (C.A. 1); *National Labor Relations Board* v. *Valley Mold Co.*, 530 F. 2d 693, 695 (C.A. 6). The Board's rules provide that a pre-trial statement will be furnished to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1).[2] The Board's rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *National Labor Retions Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2). One court of appeals described the "strong reason to maintain the confidentiality of employee statements and good reason for the Board's policy of not disclosing such statements to employers," as follows:

> Statements made during an investigation by employees to Board agents may and often do

[2] This rule is analogous to the Jencks Act (18 U.S.C. 3500), applicable to criminal proceedings, which "manifests the general statutory aim to restrict the use of [witness] statements to impeachment." *Palermo* v. *United States*, 360 U.S. 343, 349.

> reveal an employee's and his co-workers' attitudes and activities in relation to a union and their employer. If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement, a circumstance complicating a determination of the actual facts in a labor dispute.

*National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).[3]

Following the same reasoning, the courts of appeals have upheld the Board's conclusion that an employer restrains or coerces employees, in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by interrogating them to learn whether they gave a statement to a Board investigator, or asking them for a copy of such statement. See *Texas Industries, Inc.* v. *National Labor Relations Board*, 336 F. 2d 128, 133–134 (C.A. 5); *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 752–753 (C.A. 6); *Henry L. Siegel Co.* v. *National Labor Relations Board*, 328 F. 2d 25, 27 (C.A. 2). See also *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 121–122 ("'Congress has made it clear

[3] Similarly, the pre-trial disclosure of the statements of union representatives would entail "the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations * * *." *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board*, 550 F. 2d 1139, 1143 (C.A. 9); *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, 491 (C.A. 2), certiorari denied, 429 U.S. 834. See *United States* v. *Northside Realty Associates, Inc.*, 324 F. Supp. 287, 295–296 (N.D. Ga.).



> that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.* * *' This complete freedom is necessary * * * 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.' ").

The Board's limitation on pre-hearing discovery substantially minimizes the inhibiting effect of potential coercion or harassment of witnesses. Because many persons would be reluctant to volunteer information to Board investigators if they know that their names or the information they provide will be revealed, the Board's practice is to assure affiants that the information they furnish will remain confidential unless and until they are called to testify at a formal hearing (or in the unlikely event that another agency makes a valid request for the information). N.L.R.B. Case Handling Manual, Part I, Section 10058.4. Although a person who gives a statement to a Board investigator knows that if he testifies at a Board hearing, his statement may be given to the employer or union for use in cross-examination, this potential chilling effect is minimized by the facts that the vast majority of unfair labor practice proceedings are disposed of without hearing, and that most persons who give such statements are never called upon to testify.[4] More-

[4] More than 94 percent of all unfair labor practice cases closed during fiscal year 1976 were closed prior to hearing (*National Labor Relations Board Forty-First Annual Report* 222 (1976)), and many affiants who gave statements in the remaining six percent of the cases were not called to testify because their testi-

over, even when a witness is called, his statement is made available only for use in cross-examination,[5] and any portion of the statement that does not relate to the subject of the witness's testimony or the issues raised by the pleadings is excised.[6]

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mony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.

The agency's ability to dispose of such a high percentage of cases prior to hearing is dependent on its ability to conduct a sufficient investigation, which, in turn, is dependent on its ability to assure persons that the information that they furnish will be kept confidential except in special circumstances.

[5] The respondent has no right to retain copies of the statement unless it is admitted into evidence. See Section 17380.11, National Labor Relations Board Manual, Division of Judges; *Manbeck Baking Co.*, 130 NLRB 1186, 1189–1190.

[6] Board's Rule 102.118(b)(2), 29 C.F.R. 102.118(b)(2) provides:

"(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge in camera. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholdings, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an



The Board's decision not to provide for pre-trial discovery does not, however, result in unfair surprise to the respondent, or "trial by ambush." *Capital Cities Communications, Inc.* v. *National Labor Relations Board,* 409 F. Supp. 971, 977 (N.D. Cal.). Any complaint must contain a clear and concise description of the acts which are claimed to constitute unfair labor practices. 29 C.F.R. 102.15. The Administrative Law Judge may grant a motion for a bill of particulars, or for a more definite statement, if the complaint is not sufficiently clear. Also, the Administrative Law Judge is empowered to "hold conferences for the settlement or simplification of the issues * * *." 29 C.F.R. 1002.35.

In preparing for trial, an employer or union may not interrogate employees to learn if they have made a statement to Board investigators or to learn the contents of such a statement. A respondent, however, may interview persons having knowledge of the events, including employees, about specific matters alleged in the complaint. See *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 743 (C.A.D.C.), certiorari denied, 341 U.S. 914; *May Department Stores Co.,* 70 NLRB 94, 95. Finally, when the possibility of settlement is real, the Regional Offices are directed to "openly discuss" with the respondent the nature of the General Counsel's evidence on specific violations, but without revealing the names

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order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness."

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of witnesses. See General Counsel Memorandum 76–110, Program to Improve Settlements and Election Agreements, Labor Relations Yearbook 315, 317 (1976).

Contrary to the conclusion of the other courts of appeals, which recognize that the NLRA leaves the question of discovery to the Board's discretion (see pp. 14–16, *supra*), the Fifth Circuit has held that the discovery procedures of the Federal Rules of Civil Procedure are applicable to the Board by virtue of Section 10(b) of the NLRA, 29 U.S.C. 160(b), which provides that any "[unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States and under rules of civil procedure for the district courts of the United States * * *." See *National Labor Relations Board* v. *Safeway Steel Scaffolds Co. of Georgia*, 383 F. 2d 273, 276–277 (C.A. 5), certiorari denied, 390 U.S. 955; *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994, 996 (C.A. 5); *National Labor Relations Board* v. *Rex Disposables Division of DHJ Industries, Inc.*, 494 F. 2d 588, 592 (C.A. 5); Pet. App. 8A–9A.[7]

[7] The Fifth Circuit also views Section 102.30 of the Board's rules, 29 C.F.R. 102.30, which permits the taking of depositions upon good cause shown after issuance of a complaint, as providing for pre-trial discovery. See *e.g.*, *Safeway Steel Scaffolds Co.*, *supra*, 383 F. 2d at 277; *Miami Coca-Cola Bottling Co.*, *supra*, 403 F. 2d at 996.

Rule 102.30 does not, either on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pre-hearing discovery. The predecessor of the present Board Rule 102.30 was adopted and became effective in 1935, three years before the promulgation of Fed. R. Civ. P. 26, which permits litigants in the federal courts to take depositions "for the purpose of discovery." The Board rule, in contrast, was patterned after former Equity Rule 47 (superseded by Rule 26), which permitted the taking of depositions only "upon good and exceptional cause" for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery. The Board rule has not changed substantially, and the Board has consistently construed it as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial. See *Mastro Plastics Corp.*, 136 NLRB 1342, 1344, n. 7, enforced in relevant part, 354 F. 2d 170 (C.A. 2), certiorari denied, 384 U.S. 972; *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296; *Plumbers and Steamfitters Union Local 100*, 128 NLRB 398, 400, enforced, 291 F. 2d 927 (C.A. 5); *Del E. Webb Construction Co.*, 95 NLRB 377, n. 2.



This analysis of Section 10(b) is erroneous and has been rejected by the other courts that have considered the question. As the Second Circuit pointed out in *National Labor Relations Board* v. *Interboro Contractors, supra*, 432 F. 2d at 859:

> On its face [Section 10(b)] regulates the introduction of evidence at Board hearings, without imposing on the Board any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence. The legislative history of section 10(b) confirms this. Under the original Act, section 10(b) provided that "[i]n any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." This provision was heavily criticized on the ground that it allowed too much incompetent evidence to get into the record of Board hear-

> ings. It was solely to meet that criticism that section 10(b) was amended in 1947. * * * [8]

See also *D'Youville Manor, Lowell, Massachusetts, Inc.* v. *National Labor Relations Board*, 526 F. 2d 3, 7 (C.A. 1).

### B. EXEMPTION 7 OF THE FOIA, AS ORIGINALLY ENACTED, PROTECTED BOARD WITNESS STATEMENTS AGAINST PRE-HEARING DISCLOSURE

The express congressional purpose in enacting the FOIA in 1966 was to provide public access to information regarding the workings of government in order to give practical effect to the "theory of an informed electorate * * * vital to the proper operation of a democracy," while at the same time protecting "certain equally important rights of privacy" and valid governmental interests in maintaining the confidentiality of certain investigatory material. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).[9] President Johnson explained in signing the FOIA:[10]

[8] The House Report noted, H.R. Rep. No. 245, 80th Cong., 1st Sess. 5 (1947), that the amendment would "requir[e] the Board to act only upon the weight of credible legal evidence," and it described the purpose of the amendment as follows (*id.* at 41):

"Requiring the Board to rest its rulings upon facts, not interferences [sic], conjectures, background, imponderables, and presumed expertness will correct abuses under the act.

"The bill does this, by providing in section 10(b) of the amended Labor Act that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure.'"

See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 3529 (1947) (remarks of Representative Owens).

[9] See also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5–6 (1966).

[10] 2 Weekly Compilation of Presidential Documents 895 (July 11, 1966).



> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.
>
> At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. * * * A citizen must be able in confidence to complain to his Government and to provide information * * * without fear of reprisal or of being required to reveal or discuss his sources.

Congress balanced these competing interests by exempting nine categories of material from the general mandate that all identifiable records be disclosed upon request. The seventh of these exemptions, as originally enacted, protected from compulsory disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 80 Stat. 251. The legislative history indicates that this provision was to cover:

> the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court. [S. Rep. No. 813, *supra*, at 9.]

Similarly, the House report stated that Exemption 7 was intended to prevent the defendant in any crim-

inal or civil law enforcement proceeding from using the FOIA to obtain "any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, *supra*, at 11.

Since the pre-hearing release of Board witness statements under the FOIA would give a person "earlier" and "greater access" to those statements than "he would have directly" in agency proceedings, where they would not be available until after the witness had testified, the policy underlying Exemption 7 required that such statements be exempt from disclosure. Indeed, the language of Exemption 7 was amended specifically to ensure that witness statements would not be subject to pre-hearing disclosure, after Senator Humphrey objected that the original language of the bill was susceptible to an interpretation requiring disclosure of the statements of witnesses after the filing of an unfair labor practice complaint by the Board's General Counsel. 110 Cong. Rec. 17667–17668 (1964).[11]

[11] The original language of Exemption 7 exempted "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964). Senator Humphrey urged that an amendment was necessary to clarify the point that pre-hearing disclosure of Board witness statements was not intended because (110 Cong. Rec. 17667):

"Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. * * *"

He proposed two amendments protecting "investigatory files" and "statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination" (*ibid.*). Senator Long noted that Senator Humphrey's amendments "relate to investigatory files and an inclusion in the bill of the substance of the Jencks rule" and he proposed the language enacted as Exemption 7 to meet this "valuable suggestion" (*id.* at 17668).



*Wellman Industries, Inc.* v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834, held that Exemption 7, as enacted in 1966, protected against pre-hearing disclosure of witness statements obtained by Board agents during their investigation of unfair labor practice charges or objections to a Board-conducted election.[12] The court emphasized that, if "'an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement.'" It added that "exemption of investigatory files is necessary in order to prevent premature disclosure of an investigation so that the Board can present its strongest case in court." *Id.* at 431. Other courts similarly concluded that Exemption 7 protected Board witness statements against pre-hearing disclosure. See *Clement Brothers Co.* v. *National Labor Relations Board*,

[12] Respecting election objections, the court reasoned that "[w]hether or not resulting in an unfair labor practice charge, the Board's purpose [in resolving such objections] was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are 'for law enforcement purposes.'" *Wellman Industries, Inc.* v. *National Labor Relations Board*, *supra*, 490 F. 2d at 430.

282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.), cited with approval, *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (C.A.D.C.), certiorari denied, 400 U.S. 824.

C. THE 1974 AMENDMENT TO EXEMPTION 7 WAS NOT INTENDED TO DEPRIVE BOARD WITNESS STATEMENTS OF THE PROTECTION AGAINST PRE-HEARING DISCLOSURE THEY PREVIOUSLY HAD

In 1974, Exemption 7 was amended, in pertinent part, to cover:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source * * *, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *.

This amendment was intended to overrule a series of decisions of the District of Columbia Circuit that had interpreted Exemption 7 as protecting any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether enforcement proceedings were still contemplated, or even whether there was a legitimate need to withhold the information from the public.[13] The amendment was not intended to alter the purpose or scope of Exemption 7 as originally enacted, but rather to explicate these purposes and reject the overbroad interpretation of the District of Columbia Circuit.



Senator Hart, a sponsor of the amendment, explained:

> My reading of the legislative history [of Exemption 7 as enacted in 1966] suggests that Congress intended that this seventh exemption

[13] See *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A.D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A.D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A.D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A.D.C.), certiorari denied, 416 U.S. 993. As Senator Hart stated in the following colloquy with Senator Kennedy:

"Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

"* * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

"Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do."

Freedom of Information Act and Amendments of 1974 (P.L. 93–502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975) (hereafter "Source Book") 349.

was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.

Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.

That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.

* * * * *

This amendment * * * explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques or procedures.

* * * * *



Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes. [Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book: Legislative History, Texts, and other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975) (hereinafter "Source Book") 332–333.]

He concluded (Source Book 334):

This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

The legislative history contains no indication that Congress intended the amendment to overrule cases such as *Wellman Industries, supra,* holding that witness statements obtained by the Board in an investigation of a particular case were exempt from disclosure under the original Exemption 7, or to enlarge the scope of discovery under the NLRA. Indeed, Senator Hart explained that the amendment would continue to bar disclosure:

First, where the production of a record would interfere with enforcement procedures. This

> would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. * * * [Source Book 333.] [14]

Since one of the original purposes of Exemption 7 was to exempt from disclosure witness statements obtained by the Board, and since interpreting the FOIA to require such disclosure would create a potent new discovery tool in Board proceedings, the inference is compelling that Congress intended the amended Exemption 7 to continue to protect the statements of witnesses in labor cases. As the Second Circuit reasoned in *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, 491–492, certiorari denied, 429 U.S. 834:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have

[14] Although Senator Hart added (*ibid.*) that, "it is only relevant to make such determination in the context of the particular enforcement proceeding," he did not discuss the type of showing that would be required in the particular case, or foreclose the possibility that, as with witness affidavits in Board enforcement proceedings, interference with the law enforcement proceeding could be inferred from the nature of the documents sought in certain circumstances.



> done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. * * *

### D. PRE-HEARING DISCLOSURE OF WITNESS STATEMENTS OBTAINED BY THE BOARD WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS WITHIN THE MEANING OF EXEMPTION 7(A)

In view of this background, it is not surprising that every court of appeals that has considered the question—with the sole exception of the Fifth Circuit in the instant case—has recognized that the peculiar character of labor litigation is such that pre-hearing disclosure of statements obtained from employees and their representatives in connection with unfair labor practice proceedings would necessarily "interfere with" the Board's enforcement proceedings.[15] *Title Guarantee Co.* v. *National Labor Relations Board, supra; Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d

[15] See also *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131 (C.A. 4). The Fourth Circuit held that employee statements in a Board back pay proceeding were not protected against disclosure under

145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board,* 538 F. 2d 80 (C.A. 3); *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc.* v. *National Labor Relations Board,* 561 F. 2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board,* 550 F. 2d 1139 (C.A. 9);[16] *Climax Molyb-*

Exemption 7(A), since the "underlying unfair labor practice controversy has already been resolved, and all that remains is the largely objective task of ascertaining the amount of back pay" (*id.* at 1135). However, the court emphasized that "our denial of a 7(A) exemption is limited to back pay proceedings"; "[w]e do not depart from the sound precedent, including our own [*Wellman Industries, supra*], which exempts from disclosure investigatory records compiled for representation and unfair labor practice proceedings" (*id.* at 1136). But see *Charlotte-Mecklenberg Hospital Authority* v. *Perry,* C.A. 4, Nos. 76–2272 and 76–2273, decided January 26, 1978, in which the Fourth Circuit held that sworn statements taken by the Equal Employment Opportunity Commission (EEOC) from charging parties in connection with employment discrimination charges were not *per se* protected against disclosure under Exemption 7(A) of the FOIA, where the investigation was still open. The court in *Perry* stated that the decision in *Wellman Industries* was one of those which Congress intended to override by the 1974 amendment. The court held that the district court was required, in each case, to examine the statements *in camera* and determine whether their disclosure would interfere with enforcement proceedings. It concluded that the district court had not abused its discretion in determining, after *in camera* examination, that disclosure to the employer of the statements of present employees would interfere with the EEOC investigation, but that disclosure of the statements of former employees would not.

[16] Although the Ninth Circuit in *Harvey's* agreed that employee statements, and those of union representatives, are exempt from disclosure under FOIA Exemption 7(A) without the necessity for an *in camera* inspection, the case was remanded to the dis-



*denum Co.* v. *National Labor Relations Board,* 539 F. 2d 63 (C.A. 10).[17]

The courts of appeals have correctly recognized that the application of Exemption 7 to Labor Board enforcement proceedings must take account of the spe-

trict court to decide whether such inspection would be necessary to determine if statements taken from non-employees are similarly exempt. 550 F. 2d at 1143. Cf. *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 382–383 (C.A. 1).

[17] The question whether Exemption 7(A) would protect Board witness statements from disclosure after the case for which they were obtained has been closed is not presented here, nor was it presented in *Title Guarantee* or the cases following it listed above. In *Poss* v. *National Labor Relations Board,* 565 F. 2d 654, 657, the Tenth Circuit held that statements of employees and others obtained in an unfair labor practice investigation that ended in a decision not to issue a complaint were not protected against disclosure under Exemption 7(A), since "there are *no* enforcement proceedings pending, [and] none is contemplated * * *." Although the Board has not petitioned for certiorari in *Poss*, it does not agree with the Tenth Circuit's view that Exemption 7(A) protects only investigatory records in "open" cases. As the court below noted (Pet. App. A, p. 6A n. 8), despite the fact that the unjustified withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of Exemption 7 which Exemption 7(A) was designed to eliminate, the latter was not drafted in terms of whether the case was open or closed, but of whether disclosure would "interfere with enforcement proceedings." See also *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 385–386 (C.A. 1). While the disclosure of Board witness statements after a case has been closed may no longer present the danger that that case would be harmed by the premature release of evidence or information not in the possession of the respondent, it still poses the danger that such disclosure would subject the persons giving the statements to employer or union reprisal and generally inhibit the flow of information to the Board in enforcement proceedings, and thus make it more difficult for the Board to conduct those proceedings.

cial character of those proceedings. The linchpin of the courts of appeals' analysis has been the reason that discovery in labor cases has been strictly limited: "the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son, Inc.* v. *National Labor Relations Board, supra,* 538 F. 2d at 83.

In *Climax Molybdenum Co.* v. *National Labor Relations Board, supra,* 539 F. 2d at 65, the court reasoned that "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings."[18] The appellate courts have agreed with the Second Circuit's conclusion in *Title Guarantee Co., supra,* 534 F. 2d at 491, that the pre-hearing disclosure of witness statements obtained by the Board would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *."

[18] In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 91–93, the Court emphasized that *in camera* inspection of documents need not be undertaken in every case, because affidavits or even "surrounding circumstances" might be enough to show that certain documents met the requisite criteria for exemption. See also *New England Medical Center Hospital* v. *National Labor Relations Board, supra,* 548 F. 2d at 385.



The Ninth Circuit Court of Appeals accurately summed up the situation in *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board, supra,* 550 F. 2d at 1142: "[T]here can be no doubt" that pretrial disclosure of employee statements would have a "retarding effect on open and frank Board investigations of alleged unfair labor practices" that "would undermine labor policy as well as unduly broaden the scope of the FOIA."

The risk of interference with Board proceedings, though lessened to some degree, still exists where, as here, the request for pre-hearing statements is limited to those witnesses the Board intends to call at the hearing. The court of appeals acknowledged that "there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing, done in an effort to silence him or dilute the nature of his testimony" (Pet. App. A, p. 14A), and it recognized that "post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited" (*id.* at 15A). Moreover, as the First Circuit stated in *Good-*

*friend Western Corp.* v. *Fuchs, supra,* 535 F. 2d at 147, in denying an FOIA request for the statements of witnesses scheduled to testify 24 hours after the order was issued: "Even in this case we cannot rule out all possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * * .'" "There is solid evidence in the legislative history that the sponsors of the 1974 amendments acknowledged the right of an investigative agency to avoid the possible harm to a prospective law enforcement proceeding that might occur through 'premature release of evidence or information not in the possession of known or potential defendants.'" *New England Medical Center Hospital* v. *National Labor Relations Board, supra,* 548 F. 2d at 382.

The court of appeals in the instant case, however, erroneously minimized the significant change its interpretation of Exemption 7(A) would have on the scope of discovery in Board enforcement proceedings. Although the court noted the explanation of the sponsor of the 1974 amendment (*supra,* pp. 29–30) that Exemption 7(A), no less than the original Exemption 7, was intended "'to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have'" (Pet. App. A, p. 7A), it nonetheless concluded that "comparative discovery is not the key to the meaning of exemption 7(A)" (*id.* at 8A). The reasons given for this conclusion do not withstand analysis.



The court first asserted that "it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court" (Pet. App. A, p. 8A). This assertion, however, rests on the court's view that Section 10(b) of the NLRA requires the Board to adopt discovery procedures analogous to those provided by the Federal Rules of Civil Procedure—which, as we have shown, is erroneous and not shared by other courts of appeals (see pp. 15, 20–22, *supra*).

Second, the court mistakenly believed that the application of what it termed "the comparative discovery test" would require it to "look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production)" despite the fact that the FOIA "mandates release of information 'to any person'" (Pet. App. A, p. 10A). This argument misconceives the significance of the inquiry whether disclosure under FOIA would expand discovery in Board proceedings.

We agree with the court that the relevant inquiry is not whether the special needs of a particular plaintiff would permit him to secure by discovery the documents requested under FOIA. But Congress' intention that Exemption 7 prevent litigants from gaining earlier or greater access to investigative materials under FOIA than they would otherwise have is similar to the policy expressed in Exemption 5 of the FOIA, which "withholds from a member of the public documents which a private party could not discover in litigation with the agency."[19] *National Labor Re-*

[19] The court below recognized that the analysis "under exemption 7(A)'s 'no earlier or greater access' theory" was similar to

*lations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148. This Court has concluded that Exemption 5 should be construed "to exempt those documents * * * normally privileged in the civil discovery context," since "it is not sensible to construe the [FOIA] to require disclosure of any documents which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." *Id.* at 149 n. 16. Exemption 7(A) should likewise be construed to protect investigative materials that would not normally be subject to pre-trial disclosure.

Since witness statements are not subject to pre-hearing disclosure in a Board proceeding, and indeed would not routinely be available even in a civil discovery context,[20] they should be protected against disclosure under FOIA Exemption 7(A) without regard to whether an individual FOIA plaintiff could or could not demonstrate good cause for disclosure.

Third, the court believed that, "[i]f the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted 'only to the extent that * * * production * * * would * * * interfere' in some way" with an enforcement proceeding (Pet. App. A, p. 10A). The court concluded (Pet. App. A, p. 10A) that it should give effect to the "spirit of the procedural reform" that brought about the amendment of Exemption 7.

Turning to an examination of the ways in which pre-trial disclosure of witness statements might interfere with Board enforcement proceedings, the court rejected what it termed (*id.* at 14A) a "sweeping assumption of intimidation"—at least where the FOIA request was limited to the statements of persons who were to be called as witnesses. The court acknowledged (*ibid.*, footnote omitted) the "risk of interference * * * in the form of witness intimidation from harassment of an employee-witness * * * prior to the hearing, done in an effort to silence him or dilute the nature of his testimony," but it concluded that to invoke the exemption the Board must introduce evidence showing the likelihood that such intimidation would occur in the particular proceeding.[21]

As we have shown, however, the legislative history contains no support for the notion that the "reform" of Exemption 7 was intended to require pre-hearing disclosure of witness statements in Board enforcement proceedings. The court's requirement that there be

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that "under exemption 5's express test of 'not * * * available by law to a party * * * in litigation with the agency'" (Pet. App. A, p. 9A n. 15). As discussed *infra*, pp. 44–50, we also contend that the statements are protected by Exemption 5.

[20] Under Rule 26 of the Federal Rules of Civil Procedure, witness statements obtained in preparation of litigation are part of an attorney's work product and would not be producible except on a showing of special need. See discussion, *infra*, pp. 46–48.

[21] The court indicated that the following factors, *inter alia*, would be relevant to such a showing: "whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give" (Pet. App. A, p. 16A).

specific evidence of the likelihood of intimidation is both unrealistic and unworkable. In the Board's judgment, it would be unable to sustain this burden of proof in many cases, since intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.*, 557 F. 2d 559, 562 n. 8 (C.A. 6). In other cases, meeting this burden might require the Board to reveal so much of the evidence developed in its unfair labor practice investigation that, even if the district court were ultimately to rule that the statements could be withheld, the victory would be a Pyrrhic one.

Moreover, determining on a case-by-case basis whether disclosure of a particular statement would interfere with Board enforcement proceedings is a task for which, as the Tenth Circuit correctly noted, the courts are "ill-fitted." *Climax Molybdenum Co.* v. *National Labor Relations Board, supra*, 539 F. 2d at 65.[22] As the First Circuit recognized in *New England*

[22] The district courts have applied the standard enunciated by the court below as follows:

In *Delchamps, Inc.* v. *National Labor Relations Board*, Civil Action No. 78–21–H (S.D. Ala.), January 19, 1978, 97 LRRM 2583, the district court ordered the Board to disclose the statements of witnesses prior to an unfair labor practice hearing on the ground that "any intimidation the plaintiff might wish to impose could have been, or already has been, done" (*id.* at 2584). In *JTM Corporation* v. *National Labor Relations Board*, Civil Action No. 77–166–COL (M.D. Ga.), preliminary injunction issued December 27, 1977, on appeal, No. 78–1097 (C.A. 5), the employer was held to have established likelihood of success on the merits of its FOIA action because the Board did not contend, in a hearing on a preliminary injunction, that the employer had already discriminated against employees for giving information to the Board. In *Han-Dee Pak, Inc.* v. *National Labor Relations Board*, Civil Action No. C–77–2069–A (N.D. Ga.), decided January 4, 1978, notice of appeal filed January 18, 1978 (C.A. 5), evidence regarding prior unfair labor practices committed by the employer was held insufficient to establish that intimidation of witnesses was likely to result from pre-hearing disclosure of their statements in the present unfair labor practice proceeding.



*Medical Center Hospital* v. *National Labor Relations Board, supra*, 548 F. 2d at 384:

> The specter of involvement of the district court in discovery matters during an ongoing unfair labor practice proceeding, with lengthy stays while the district court (and court of appeals) review the Board's file, is a compelling reason to construe Exemption 7(A) to shelter investigatory records in the Board's case file prior to the time that foreseeable administrative and judicial proceedings are completed. Any other approach could trap the Board into foregoing all claims to exemptions under FOIA if it is not to accept crippling delays in the prosecution of unfair practice cases while litigating the exemptions in court.

The Board's experience in this and other cases confirms the validity of the latter point. Here the Board was faced with the choice of either turning over the witness statements to the Company and exposing its witnesses to the risk of harassment and reprisal, or delaying its hearing in the underlying unfair labor practice case until the Company's FOIA suit was finally adjudicated; because the Board

elected the latter course, the unfair labor practice hearing has been delayed almost two years.

Moreover, in those cases where the Board, pending a resolution of the issue by this Court, has attempted to make the particularized showing of harm required by the decision of the court below, the Board's efforts have been hampered by the fact that FOIA suits are usually instituted only shortly before the scheduled unfair labor practice hearing and injunctive relief is usually requested to insure disclosure prior to the hearing. Despite the Fifth Circuit's statement that it "need not decide whether or when a district court adjudicating a FOIA claim may enjoin ongoing or prospective NLRB proceedings"[23] (Pet. App. A, pp. 2A–3A), district courts faced with this situation have granted preliminary injunctions, thus delaying Board proceedings pending a decision of the merits of the FOIA claim,[24] or have severely limited the Board's opportunity to prepare its defense to the FOIA complaint.[25] In these circumstances, even if the Board were able to satisfy the test of the court below, it could do so only at the expense of sub-

[23] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1.

[24] See *JTM Corporation* v. *National Labor Relations Board*, *supra; Clements Wire & Manufacturing Company, Inc.* v. *National Labor Relations Board*, Civil Action No. S78–0002 (C) (S.D. Miss.), preliminary injunction issued January 6, 1978, on appeal, No. 78–1296 (C.A. 5); *Enterprise Products Company* v. *National Labor Relations Board*, Civil Action No. 78–278, Sec. C (G) (E.D. La.), preliminary injunction issued February 1, 1978.

[25] See, for example, *Han-Dee Pak, Inc.* v. *National Labor Relations Board*, *supra*, where the company filed a complaint in district court on December 30, 1977, requesting statements of witnesses to be called by the General Counsel in an unfair labor practice hearing scheduled for January 9, 1978. The court ordered the Board to present all evidence at a hearing on January 4, 1978, and, after such restricted presentation, ruled that the Board had failed to meet its burden of proof and ordered release of the statements on January 5, 1978, or at least four days before any hearing at which the witnesses would be called. See also, *Procter & Gamble Manufacturing Company* v. *National Labor Relations Board*, Civil Action No. C.A. 3–78–0149–P (N.D. Tex.), decided February 10, 1978.



jecting its unfair labor practice cases to "crippling delays" (*supra,* pp. 41–42). Such a result is at odds with this Court's recognition that "exemptions to disclosure under the Act were intended to be practical workable concepts." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 381–382.

In sum, the result of the decision of the court of appeals below is the unwarranted transformation of the FOIA into a new and potent discovery tool in Board enforcement proceedings, despite this Court's recognition that the FOIA was designed to inform the public about agency action, and not to authorize discovery or otherwise benefit private litigants. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10. As shown, *supra*, pp. 26–31, in amending Exemption 7 in 1974, Congress did not intend to effect such a drastic and deleterious change. There is no indication that when Congress provided an exemption for law enforcement records, the disclosure of which would "interfere with enforcement proceedings," it meant

to require an agency always to produce evidence of the effect of disclosure on the particular enforcement proceeding involved, and to preclude the agency from making a showing, based on its cumulative experience, that disclosure of certain categories of material would interfere with its enforcement proceedings.

II. EXEMPTION 5 OF THE FOIA PROTECTS BOARD WITNESS STATEMENTS FROM PRE-HEARING DISCLOSURE

Exemption 5 of the FOIA, which the 1974 amendments did not change, exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This exemption "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context * * * ." *Renegotiation Board* v. *Grumman Engineering Aircraft Corp.*, 421 U.S. 168, 184. The exemption extends to "those documents * * * normally privileged in the civil discovery context." *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149. Thus, the relevant consideration is not whether a document would be discoverable in "litigation in which the private party's claim is the most compelling," but rather whether the document "would 'routinely be disclosed' in private litigation." *Id.* at 149 n. 16, citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Among the privileges which "Congress had * * * specifically in mind in adopting Exemption 5" are "the Government's executive privilege" and "the attorney's work-product privilege" *National Labor Relations Board* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 150, 154. The Senate Report on the FOIA stated that this exemption would include "the working papers of the agency attorney." S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).



As detailed in *National Labor Relations Board* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 138–141, unfair labor practice charges are filed in the first instance with the Board's Regional Office, where they are investigated by a member of the Regional Office staff, who usually will interview witnesses and take statements from them. If, on the basis of the investigation the Regional Director believes the charge has merit, a complaint will issue, unless there is a settlement.

If in the Regional Director's judgment the charge has no merit, the charging party will be advised of this determination and of his right to appeal to the General Counsel in Washington, D.C. If the charging party exercises this right, the entire file in the possession of the Regional Director will be sent to the General Counsel's Office in Washington, D.C. Based upon a review of this file, and such additional information as may be appropriate, the General Counsel will either sustain the Regional Director's ruling or direct that a complaint be issued.

The statements obtained from witnesses during the investigation conducted by the Regional Office serve two related and essential functions. (1) They are the basis upon which agency officials can evaluate the allegations in the charge and determine whether or not

sufficient evidence is likely to be adduced at a hearing to establish a violation. Without such statements, it would be virtually impossible for the Regional Director to make a reasoned judgment whether or not to issue a complaint. These statements also provide the basis for the General Counsel to review the Regional Director's determination not to issue a complaint when an appeal is taken from that ruling. (2) After a complaint is issued, the statements are used by the agency attorney handling the case to prepare for trial. As discussed in Point I, *supra,* the Board's rules make no provision for pre-hearing disclosure of these statements because of the potential for witness harassment and intimidation, and the danger that the respondent will learn the Board's case in advance and frustrate the proceedings or construct defenses.

As the court below acknowledged (Pet. App. A, p. 21A), the witness statements the Company requested in this case fall within the work product privilege, as defined in *Hickman* v. *Taylor,* 329 U.S. 495,[26] because

[26] In *Hickman*, the plaintiff sought the production of all written statements of witnesses obtained by respondents' counsel, as well as accounts of any oral statements made by such witnesses and any memoranda relating thereto. 329 U.S. at 499–500. The Court concluded that, while such material was not protected by the attorney-client privilege, it was not automatically subject to discovery:

"Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.

"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed * * * the 'work product of the lawyer'." (329 U.S. at 510–511.)

The Court noted that this did not mean that "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511. "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized * * * that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production * * *." *Id.* at 512. The Court added, however, that rarely, if ever, would there be adequate justification for requiring disclosure of oral statements made by witnesses to an attorney, "whether presently in the form of his mental impressions or memoranda." *Ibid.*

[27] As this Court recognized in *United States* v. *Nobles*, 422 U.S. 225, 238–239 (footnote omitted), the attorney work product privilege—"is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for



they are documents prepared in anticipation of litigation, either by attorneys or those working with them.[27]

Accordingly, if the full privilege recognized in *Hickman* [28] is incorporated into Exemption 5, the statements fall within the protection of the exemption.

The court of appeals, concluding that "the purpose of Exemption 5 was to protect agency deliberative processes," held that "purely factual material such as verbatim witness statements must not fall within it" (Pet. App. A, p. 22A).[29] The court based its conclusion upon this Court's holding in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, that the executive privilege incorporated into Exemption 5 does not protect purely factual material from disclosure.

trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."

The statements obtained by Board investigators to assist Board attorneys are subject to the work product privilege. See *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F. 2d 223, 233–234 (C.A. 5), certiorari denied, 414 U.S. 822; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285, 289–290 (C.A. 2), certiorari denied, 342 U.S. 812.

[28] Rule 26(b)(3) of the Federal Rules of Civil Procedure, as adopted in 1970, incorporates the work product privilege recognized in *Hickman*. It provides, in relevant part, that: "a party may obtain discovery of documents and tangible things * * * prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

[29] A similar interpretation of Exemption 5 has been adopted by two other courts of appeals. *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1137–1138 (C.A. 4); *Poss* v. *National Labor Relations Board*, 565 F. 2d 654, 659 (C.A. 10).



The premise of the Court's analysis in *Mink* was its discussion of the "finite limits" of the doctrine of executive privilege, and its conclusion that—in the absence of a claim of state secrets—purely factual material would be available for discovery by private parties in litigation with the government. *Id.* at 87–88. The Court reasoned that since the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policymaking processes stand on a different footing than purely factual material, because disclosure of the latter would not ordinarily reveal the deliberative process.

This reasoning is not, however, applicable to the attorney work product privilege, which is not limited to materials reflecting an attorney's deliberative processes, but protects an attorney's entire course of preparation, including "interviews, [witnesses'] statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Hickman* v. *Taylor, supra,* 329 U.S. at 510–512. See also *In re Murphy,* 560 F. 2d 326, 333–335 (C.A. 8); *In re Natta,* 410 F. 2d 187, 193 (C.A. 3), certiorari denied *sub nom. Montecatini Edison S.p.A.* v. *E. I. duPont de Nemours & Co.,* 396 U.S. 836. Since disclosure of factual material in an attorney's files would violate the protected status of these files no less than would the disclosure of deliberative material therein, the

work product privilege, unlike executive privilege, protects both types of material.[30] Cf. *Brockway* v. *Department of Air Force*, 518 F. 2d 1184, 1192–1193 (C.A. 8).[31]

Accordingly, since the attorney work product privilege is not inherently limited to materials reflecting deliberative processes, but by definition encompasses all materials—including witnesses' statements—obtained by an attorney in advance of litigation, the court of appeals erred in holding that these statements were not within Exemption 5.

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[30] Although under Rule 26(b)(3) of the Federal Rules of Civil Procedure (n. 28, *supra*), an attorney's mental impressions are entitled to an absolute privilege against disclosure whereas factual material gathered by him is entitled only to a qualified privilege, this distinction is irrelevant for purposes of construing the scope of Exemption 5 of the FOIA (see *supra*, p. 44).

[31] In that case, the Eighth Circuit held that Exemption 5 covers witness statements furnished to the Air Force safety investigation board, even though they were not policy memoranda. The court found that there was a "qualified executive privilege" for such statements. 518 F. 2d at 1191–1192. Moreover, the court concluded that the "'factual versus deliberative distinction is inadequate to resolve the difficult question whether * * *' * * * witness statements should be protected by Exemption 5"; rather, "it is more appropriate to view the claim of government or executive privilege from the perspective of the purposes and goals of the FOIA and this specific exemption." *Id.* at 1192. Applying this test, the court found that the FOIA's policy of not inhibiting the free flow of information and free discussion within the agency "will be thwarted by the disclosure of these witness statements," while "the nondisclosure of the witness statements will have no great bearing" on the FOIA's policy of disseminating useful information to the public. For "without the assurances of confidentiality the information probably would not come to light at all and would be lost not only to any individual seeking the information, but also to the Air Force seeking improvement in safety procedures." *Id.* at 1193.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978